

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

BRIAN R. SILLICK,

Petitioner,

vs.

JOHN F. AULT, Warden,

Respondent.

No. C02-185-LRR

ORDER

TABLE OF CONTENTS

I. INTRODUCTION	2
II. PROCEDURAL BACKGROUND	2
A. Trial	2
B. Direct Appeal	3
C. State Post-Conviction Relief Proceedings	9
D. Federal Post-Conviction Relief Proceedings	16
III. STANDARD OF REVIEW	24
IV. 28 U.S.C. § 2254 MOTION	25
A. Applicable Standard	25
B. Analysis of Properly Exhausted Claims	26
1. Ineffective Assistance of Counsel Standard	29
2. Combined Defense Instruction and Marshaling Instruction Errors	31
a. Combined Defense Instruction	31
b. Marshaling Instruction Errors	36
3. Definitions of Specific Intent Elements	39
C. Procedurally Defaulted Claim	44
V. CONCLUSION	47

I. INTRODUCTION

The matter before the court is Petitioner Brian R. Sillick's ("Sillick") Objections (docket no. 19) to Chief Magistrate Judge John A. Jarvey's Report and Recommendation (docket no. 18) in which he recommends denying Sillick's action filed pursuant to 28 U.S.C. § 2254 (docket no. 1).

II. PROCEDURAL BACKGROUND

Sillick does not dispute Chief Magistrate Judge Jarvey's summary of the relevant procedural background surrounding this case. For convenience, the court will restate this case's procedural background.

A. Trial

On June 13, 1994, Sillick was charged with first-degree murder, in violation of Iowa Code §§ 707.1, 707.2 and 902.7, for killing his girlfriend, Tammi Wilson ("Wilson"), on May 2, 1994. Sillick's jury trial commenced January 30, 1995.¹ The evidence presented at trial was that on the morning of May 2, 1994, eight-year old Lindsey Wilson ("Lindsey") awoke to the sound of her mother, Wilson, arguing with Sillick. Wilson got a donut for Lindsey. As she sat and ate her donut, Lindsey listened to Sillick and Wilson. Sillick yelled at Wilson and Wilson cried. Lindsey watched as Sillick went into a bedroom, returned with a sawed-off shotgun, and shot Wilson. Lindsey testified that, before Sillick shot her mother, she heard Wilson say, "Don't do this in front of my kids." Sillick shot Wilson three times with the sawed-off shotgun. Police later discovered a fourth hole from the shotgun blast in the carpeting on the hallway floor just above Wilson's head. Lindsey watched as Sillick, still holding the shotgun, retrieved his keys from the television room and "drove off." Sillick drove to the Cedar Rapids Police Station, approached several officers standing outside of the building, stuck out his hands,

¹ Attorneys David Grinde and Quint Meyerdirk represented Sillick at trial.

dropped his keys on the pavement, and announced, “I just shot somebody. I want to give myself up.”

The case was defended on the theory that Sillick, due to his extensive use of cocaine and consumption of alcohol, did not have the requisite intent to kill Wilson in order to be convicted of first-degree murder. Sillick asserted through evidence and testimony, not his own, that he had a history of depression and drug and alcohol abuse, had sought treatment for drug and alcohol abuse, had been using cocaine for several days prior to shooting Wilson and had been drinking beer on the morning of the crime. A defense expert testified that, during an interview with Sillick concerning the time prior to shooting Wilson, Sillick relayed that he had not slept for four days, had been hearing voices and had hallucinated through the morning of the shooting and had experienced paranoia and panic. According to expert testimony regarding an interview with Sillick, Sillick did not remember actually shooting Wilson but recalled stepping over her body and “beginning to hunt for his car keys.” A defense expert testified that Sillick met the criteria for “cocaine psychosis” at the time of the shooting. On February 9, 1995, the jury returned a unanimous verdict of guilty of first-degree murder. On March 10, 1995, the Iowa District Court for Linn County sentenced Sillick to life imprisonment. *See State v. Sillick*, FECR002422 (Iowa Dist. Ct. for Linn County 1995).

B. Direct Appeal

On March 30, 1995, Sillick filed his notice of appeal to the Iowa Supreme Court.² On direct appeal, Sillick raised the following issues: (1) whether the district court abused its discretion in excluding impeachment evidence concerning the State’s expert’s opinion that Sillick is guilty of only second degree murder; (2) whether Sillick was denied his right

² Attorney Sharon Stevens represented Sillick on direct appeal.

to the effective assistance of counsel for failing to object to a jury instruction which combined and confused the concepts of intoxication and diminished responsibility such that the jury was not sufficiently instructed on either principle; and (3) whether the State proved beyond a reasonable doubt that Sillick committed first degree murder.

First, Sillick argued the trial court abused its discretion in excluding a portion of the written report prepared by the State's expert witness, Dr. Frederickson, which Sillick wished to use at trial to impeach Dr. Frederickson's credibility. Dr. Frederickson wrote in his report, "I would note that most inmates who commit crimes like his are doing time for second degree murder." Ct. Ex. 3. Prior to trial, the State filed a motion in limine asking the court to exclude from evidence only that sentence from Dr. Frederickson's report. Sillick resisted the motion in limine and, prior to trial, the trial court excluded the evidence as unduly prejudicial to the State. At trial, Dr. Frederickson testified Sillick was not psychotic at the time of the shooting. He also mentioned two of his psychotic patients and the verdicts in their trials. Sillick's attorneys made no objection to Dr. Frederickson's testimony about his psychotic patients on the basis they could not cross-examine Dr. Frederickson about such statement as a result of the court's ruling on the State's motion in limine. Sillick's trial counsel cross-examined Dr. Frederickson but did not question Dr. Frederickson regarding the statement the trial court excluded from evidence. Sillick's attorneys did not make an offer of proof during the trial regarding the sentence excluded from Dr. Frederickson's report pursuant to the court's ruling on the State's motion in limine.

Second, Sillick claimed he received ineffective assistance of counsel when his trial counsel failed to object to Jury Instruction 20, which was a combined instruction regarding diminished responsibility and intoxication. Jury Instruction 20 reads:

INSTRUCTION NO. 20

“Diminished responsibility” means a mental condition which does not allow the person to form a specific intent. Concerning element number 4 of Instruction No. 15, it means a mental condition which does not allow the person to form a premeditated, deliberate, specific intent to kill.

“Diminished responsibility” does not entirely relieve a person of the responsibility for his actions and is not the same as an insanity defense.

The Defendant claims he was under the influence of drugs at the time of the alleged crime. The fact that a person is under the influence of drugs does not excuse nor aggravate his guilt.

Even if a person is under the influence of a drug, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the drug and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.

Neither “diminished responsibility” nor “intoxication” can reduce Second Degree Murder to Manslaughter.

The Defendant does not have to prove “diminished responsibility” or “intoxication”; rather, the burden is on the State to prove the Defendant was able to, and did, form the specific intent required.

State v. Sillick, No. 6-569/95-0578 (Iowa Ct. App. 1997), Appellant’s Appx. at 617-18. Prior to instructing the jury, the trial court asked the attorneys whether either side had any objections to the instructions. The State objected to Jury Instruction 20 on the basis the State did not believe a defendant is entitled to use both defenses. Furthermore, the State believed the evidence supported the intoxication defense and there was insufficient evidence to support a diminished responsibility defense. However, if the court intended to instruct the jury as to both defenses, while the State’s attorney would not necessarily have chosen to combine the two defenses in one instruction, the State found no particular

language objectionable. Sillick's trial counsel stated he had no exceptions or objections to any of the court's instructions. Regarding Jury Instruction 20, Sillick's attorney stated he believed there was sufficient evidence presented to give both instructions.

In his appellate brief, Sillick stated,

It is apparent that the district court prepared this instruction by combining part of the Uniform diminished responsibility instruction with the entire Uniform Instruction on intoxication. See Uniform Instructions 200.12 and 200.14.

Nonetheless, in creating Instruction 20, the district court deleted the last two paragraphs of the Uniform Instruction on diminished responsibility. The deleted portions of the instruction provide:

You should determine from the evidence if the defendant was capable of premeditating, deliberation, and forming a specific intent to kill.

If you have a reasonable doubt the defendant was capable of acting deliberately, with premeditation, and the specific intent to kill, then the defendant cannot be guilty of First Degree Murder. You should then consider the lesser included charges.

Uniform Instruction 200.12. These deleted portions of the instruction were crucial to the diminished responsibility defense because they explain how to apply the law in relation to the defense. The entire Uniform Instruction makes clear that a defendant's mental condition may render him incapable of premeditating, deliberating or forming specific intent. The instruction further explains that a defendant cannot be convicted of First Degree Murder if reasonable doubt exists as to premeditation, deliberation or the specific intent to kill. See Uniform Instruction 200.12. The instruction given in this case fails to make these issues clear.

State v. Sillick, No. 6-569/95-0578, Appellant's Br. at 14-15.

Sillick also argued he received ineffective assistance of counsel because his attorney failed to seek admission of the excluded statement from Dr. Frederickson's report during Dr. Frederickson's cross-examination after he testified on direct examination regarding his other psychotic patients' cases. Sillick maintained that had his attorney raised the issue before the district court after Dr. Frederickson's direct examination testimony, the excluded evidence from the report would have been admissible, and the failure to move to admit such evidence was obviously prejudicial to Sillick because it bore upon the crux of his case.

Finally, Sillick argued the State failed to prove beyond a reasonable doubt that he had the requisite mental state to commit first-degree murder so the trial court erred in failing to grant his motion for judgment of acquittal.

On February 26, 1997, the Iowa Court of Appeals rejected Sillick's claims, including his ineffective assistance of counsel claims, and affirmed Sillick's conviction. *State v. Sillick*, No. 6-569/95-0578. Specifically, the Iowa Court of Appeals ruled that with regard to Sillick's argument the trial court abused its discretion in excluding a portion of Dr. Frederickson's report which Sillick wished to offer to impeach Dr. Frederickson, Sillick did not preserve the error for appeal because, following the trial court's Order granting the State's motion in limine excluding such evidence, Sillick did not object or otherwise raise the issue during trial. *Id.* at 5. With regard to Sillick's ineffective assistance of counsel claim, the Iowa Court of Appeals rejected Sillick's claim that he received ineffective assistance of counsel when his attorney failed to object to the combined theory of defense instruction because the Iowa Court of Appeals found no error in the combined instruction, so Sillick's attorney had no duty to object to the instruction. *Id.* The Iowa Court of Appeals also rejected Sillick's claim he received ineffective assistance of counsel when his attorney failed to impeach the State's expert witness because

the impeachment claim was weak and even if it should have been pursued, the court could not conclude the outcome of the trial would have been different. *Id.* at 5-6. Regarding Sillick's claim that there was not substantial evidence to support the premeditation, deliberation or intent to kill elements of first-degree murder, the Iowa Court of Appeals rejected such claim and found substantial evidence existed to support the verdict. *Id.* at 6.

On July 23, 1997, the Iowa Supreme Court reviewed Sillick's appeal; that is, it considered the same four challenges to Sillick's conviction which were presented to the Iowa Court of Appeals. The Iowa Supreme Court ruled as follows: (1) the trial court did not abuse its discretion in excluding the statement from Dr. Frederickson's written report and, thus, not allowing Sillick to impeach Dr. Frederickson with the excluded statement, because any relevancy the evidence possessed was outweighed by its possible prejudice to the State; (2) error was not preserved on Sillick's challenge to Jury Instruction 20, so any objection other than ineffective assistance of counsel was waived, but Sillick was free to raise ineffective assistance on this issue during post-conviction relief proceedings; (3) Sillick's ineffectiveness claim regarding the failure to impeach Dr. Frederickson with the excluded statement from his report was moot because of its ruling that the trial court did not abuse its discretion in excluding such statement; and (4) a rational trier of fact could have found Sillick had the requisite intent to kill and, thus, the evidence was sufficient to support the first-degree murder conviction. *See State v. Sillick*, No. 162/95-578 (Iowa 1997). Based on its review, the Iowa Supreme Court vacated the decision of the Iowa Court of Appeals and affirmed the judgment of the Iowa District Court for Linn County. *Id.* at 5. Procedendo issued September 12, 1997.³

³ Iowa civil and criminal court records are available online at the following website:
(continued...)

C. State Post-Conviction Relief Proceedings

On June 16, 1998, Sillick challenged his conviction and resulting sentence by filing an application for post-conviction relief in the Iowa District Court for Linn County.⁴ In his application for post-conviction relief, Sillick claimed his trial and appellate counsel were ineffective in the following ways:

- (1) Failure to object to critical jury instructions improperly combining two separate defenses [which violated Sillick's right to due process]⁵.
- (2) Failure to object to jury instructions that omitted language from the essential elements of first-degree murder [which thereby violated due process and equal protection of the law]⁶.
- (3) Failure to have the first-degree murder marshaling instruction include a jury finding for each defense interposed [in violation of due process], thereby compelling the jury to consider and determine mental capacity prior to entering a first-degree murder verdict.
- (4) Failure to object to the Trial Information that failed to allege the essential elements for first-degree murder.
- (5) Failure to object to preserve error on the prosecutor's improper closing remarks.

³(...continued)

<http://www.iowacourts.state.ia.us>. The only record of procedendo being issued in this case is available online.

⁴ Attorney Jon Kinnamon has represented Sillick throughout his state and federal post-conviction relief proceedings.

⁵ Sillick added this due process argument regarding claims (1) and (3) in his Amendment to PCR Petition. *See Sillick v. State*, No. 01-284, Appellant's Appx. at 16.

⁶ Sillick added this due process and equal protection argument in his Second Amendment to Postconviction Relief Application. *See Sillick v. State*, No. 01-284, Appellant's Appx. at 26.

- (6) Failure to object to [S]tate's questions to its expert as to Defendant's mental capacity for malice and malice aforethought which were not an issue of the case.
- (7) Failure to object to verdict form required by law in cases where the defense of diminished responsibility is asserted.
- (8) Failure to attempt to reverse the trial court's pre-trial ruling sustaining the State's Motion in Limine concerning a portion of the [S]tate's expert deposition.

Sillick v. State, LACV033083, 2 (Iowa Dist. Ct. for Linn County 2000). Because Sillick's post-conviction relief claims were related, the Iowa District Court for Linn County addressed all of them in the context of ineffective assistance of counsel. On November 21, 2000, the Iowa District Court for Linn County concluded, with respect to all eight claims, trial and appellate counsel acted well within the range of normal competency required of a defense attorney; the court denied Sillick's application for post-conviction relief. *Id.* at 4.

On November 30, 2000, Sillick filed an application for enlarged or amended findings pursuant to Iowa Rule of Civil Procedure 1.904(2). On February 7, 2001, the Iowa District Court for Linn County denied, for the most part, Sillick's application for enlarged or amended findings. The Iowa District Court for Linn County amended its findings to reflect the fact the Iowa Supreme Court preserved for post-conviction review the following claims grounded in ineffective assistance of counsel: (1) trial counsel's failure to object to an instruction; and (2) combining the concepts of intoxication and diminished responsibility, which was allegedly erroneous for its failure to adequately explain the defense of diminished responsibility.

On February 12, 2001, Sillick filed a notice of appeal. On appeal, Sillick argued he received ineffective assistance of counsel from his trial counsel for the same eight reasons raised before the Iowa District Court for Linn County in the post-conviction relief

proceeding and he received ineffective assistance of counsel from his appellate counsel because she failed to preserve the trial error on direct appeal. Sillick divided his arguments into two issues: (1) ineffective assistance regarding the jury instructions; and (2) ineffective assistance regarding other trial-related issues.

With regard to the first issue, i.e., whether he received ineffective assistance of trial counsel regarding the jury instructions, Sillick argued Jury Instruction 20, which combined the concepts of intoxication and diminished responsibility, was erroneous for its failure to adequately explain both defenses. Because his appellate attorney raised the issue on direct appeal and preserved error, Sillick urged this ineffectiveness claim only against trial counsel. Sillick argued trial counsel was ineffective for failing to object to the combined instruction and to request separate instructions on intoxication and diminished responsibility. Sillick further averred the combined instruction fails to instruct the jury that the evidence presented at trial regarding cocaine intoxication and cocaine-induced psychosis may be applied to a determination of a temporary overdose of cocaine in relation to the time of the shooting, and separately, to a cocaine-induced psychosis, which produces symptoms of paranoid delusions, suspiciousness, repetitive stereotypic behavior and hallucinations. Sillick also maintained the language from Iowa Criminal Jury Instruction 200.12 which was omitted from Jury Instruction 20 distinguishes between evidence of the capacity for specific intent and evidence (or lack thereof) of possessing the intent itself; in other words, the omitted portion of the model instruction tells the jury how to integrate its finding on the issue of intoxication or diminished responsibility with the other jury findings required for first-degree murder. Sillick argued he was prejudiced by not having two separate instructions that explained each defense.

Sillick further maintained the model Iowa Criminal Jury Instructions, which cite *State v. Hofer*, 28 N.W.2d 475 (Iowa 1947), for the definitions of the specific intent

elements and malice aforethought, omitted any jury findings on diminished responsibility and provided no guidance to ensure that diminished responsibility was determined by the jury before any guilty verdict to first-degree murder was authorized. Sillick urged that his trial and appellate counsel, unaware that the definitions of essential elements in the uniform instructions were not in accordance with *Hofer*, relied upon the incomplete model jury instructions rather than formulating or offering instructions which correctly state the law as set forth in *Hofer*. Sillick contended a fair trial would involve a jury verdict based on the essential elements as defined in *Hofer*. Therefore, Sillick averred, he demonstrated cause for showing the legal basis for his jury instruction claim of error was not reasonably available to trial or appellate counsel.

Sillick's final argument regarding Jury Instruction 20 is that his right to due process and equal protection were violated because the jury instructions improperly characterized the essential elements of first-degree murder. Sillick contended it was a violation of due process and equal protection to define the essential elements differently on a case-by-case basis. Sillick urged that although the State had the burden to disprove Sillick's defenses of intoxication and diminished responsibility, trial counsel was ineffective for failing to object that the jury instructions failed to state mental capacity for first-degree murder may be negated by either defense (properly defined), and therefore, must be separately applied to the evidence.

With regard to the second issue, i.e., whether Sillick received ineffective assistance of counsel regarding other trial-related issues, Sillick argued the failure of the Trial Information to set out the essential elements of the crime or to cite a particular statutory provision of first-degree murder constituted a substantive jurisdictional defect. In the alternative, if the Trial Information was determined to be insufficient but not defective, Sillick contended his counsel's failure to object to the Trial Information on the grounds it

did not set out the essential elements of the crime or to cite a particular statutory provision of first-degree murder constituted ineffective assistance of counsel by which he was prejudiced. Sillick maintained his trial counsel was ineffective because he failed to object to the prosecutor's closing remarks challenging the legal basis of Sillick's theories of defense by telling the jury a lot of people do not like the intoxication defense and if those people had their way, they would do away with it. Furthermore, Sillick urged, the prosecutor's comments were so prejudicial they compromised his substantive rights because they were framed within the context of whether the jury empathized with Sillick or the victim's family. Sillick also claimed he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's question and the State's expert's answer regarding whether Sillick had the mental capacity for malice and malice aforethought. Specifically, Sillick argued the his mental capacity for malice aforethought, a general intent element, was not placed at issue by raising the defenses of diminished responsibility and intoxication; by seeking and receiving testimony regarding Sillick's mental capacity for malice and malice aforethought, the State blurred the defenses between a premeditated, willful and deliberate intent to kill and the general intent of malice aforethought. Thus, Sillick urged, the State improperly confused and lessened the State's burden of proof as to what constitutes specific intent. Next, Sillick averred he received ineffective assistance of counsel because his trial counsel failed to object to the omission of a special verdict form regarding diminished responsibility, as required by Iowa Rule of Criminal Procedure 21. Sillick then argued he received ineffective assistance of counsel where his lawyer failed to ask the trial court to reverse its ruling on the State's motion in limine regarding the statement excluded from Dr. Frederickson's written report during trial when Dr. Frederickson raised the issue by discussing other psychotic patients' cases and verdicts. Finally, Sillick urged combined errors may violate the right to effective

assistance of counsel.

On September 11, 2002, the Iowa Court of Appeals affirmed the Iowa District Court for Linn County's decision denying Sillick's application for post-conviction relief. *See Sillick v. State*, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002). Specifically, the Iowa Court of Appeals, evaluating the jury instructions as a whole, determined the concepts embodied in the two paragraphs of Iowa Criminal Jury Instruction 200.12 which were omitted from the instructions given to the jury at Sillick's trial were adequately explained in the court's other jury instructions. *Id.* at 8-9. Therefore, the Iowa Court of Appeals concluded, there was no breach of duty or prejudice stemming from counsel's failure to object to the two paragraphs not being included. *Id.* at 9. With regard to Sillick's allegation that his right to due process and equal protection were violated because the essential elements of first-degree murder were not defined in the marshaling instruction as provided in *Hofer*, the Iowa Court of Appeals ruled the definitions were consistent with the definitions presented in *Hofer* and it found no due process or equal protection violations. *Id.* at 10. Addressing Sillick's contention that the marshaling instruction was inadequate because it failed to require the State to disprove his defenses as an added element, the Iowa Court of Appeals found this argument meritless and determined his counsel was not ineffective for failing to raise the issue at trial. *Id.* The Iowa Court of Appeals, turning next to Sillick's argument the Trial Information was defective or at least inadequate, found the Trial Information complied with the content requirements of the Iowa Rules of Criminal Procedure and gave Sillick notice of the offense charged, which is all that is required. *Id.* at 11-12. With regard to Sillick's contention that he received ineffective assistance because his counsel failed to object to the prosecutor's allegedly improper closing remarks, the Iowa Court of Appeals ruled trial counsel's interpretation of the prosecutor's comment - asking the jury not to go too far and

return a verdict of less than second-degree murder - was reasonable, and his decision not to object was a reasonable trial strategy. *Id.* at 13. Addressing Sillick's argument that trial counsel should have objected when the prosecutor asked and received an answer from its expert witness as to whether Sillick had the mental capacity to form malice or malice aforethought, the Iowa Court of Appeals found the question was not answered, but assuming it had been answered, there was no prejudice to Sillick in his trial counsel's failure to object because the State had to prove Sillick had malice aforethought as an essential element of first-degree murder. *Id.* at 14. Therefore, the Iowa Court of Appeals opined, the State was entitled to present evidence Sillick did not lack the capacity to have malice aforethought. *Id.* Turning to Sillick's claim trial counsel was ineffective in failing to object to the omission of a verdict form by which the jury could find him not guilty by reason of diminished responsibility, the Iowa Court of Appeals determined that, although trial counsel breached an essential duty by not being aware of and timely objecting to the omission of an appropriate instruction and verdict form, Sillick failed to prove resulting prejudice because, as no one disputed Sillick actually committed the crime, there was no possibility Sillick would be acquitted and the special verdict form would be of significance only if there were a reasonable probability of complete acquittal. *Id.* at 15-16. Furthermore, the Iowa Court of Appeals ruled, the jury instructions and verdict forms that the trial court submitted were fully adequate to allow the jury to find Sillick not guilty of first-degree murder but guilty of a lesser included offense, or to find Sillick not guilty and acquit him, whether because of diminished responsibility or because the State otherwise did not prove its case; the jury's verdict of first-degree murder establishes beyond a reasonable doubt the jury rejected Sillick's theories of defense and found he had the requisite specific intent to kill. *Id.* at 16. Addressing Sillick's argument his trial counsel was ineffective for failing to ask the trial court to reverse its motion in limine ruling

regarding the sentence removed from Dr. Frederickson's report, the Iowa Court of Appeals found Sillick showed neither a breach of duty nor resulting prejudice because, as the Iowa Supreme Court found on direct appeal, there was no abuse of discretion in the trial court's ruling as any relevancy was outweighed by possible prejudice to the State and any ineffectiveness claim derived from the same contention was moot. *Id.* at 17. Finally, the Iowa Court of Appeals determined, appellate counsel was not ineffective for failing to preserve the alleged errors on direct appeal. *Id.*

On October 1, 2002, Sillick applied to the Iowa Supreme Court for further review from the Iowa Court of Appeals' decision. In such application, Sillick argued trial and appellate counsel's failure to preserve error on the fundamentally flawed jury instructions constituted ineffective assistance of counsel. Specifically, Sillick maintained counsel was ineffective for failing to object to Instruction Number 20, regarding the combined defenses, and Instruction Number 15, regarding the essential elements of first-degree murder. Sillick did not raise the argument the combined errors violated his right to effective assistance of counsel, as he had done in his briefing to the Iowa Court of Appeals.

On December 2, 2002, the Iowa Supreme Court denied further review of Sillick's application for post-conviction relief. *Sillick v. State*, No. 01-284 (Iowa 2002) (en banc). Procedendo issued December 6, 2002.⁷

D. Federal Post-Conviction Relief Proceedings

On December 30, 2002, Sillick filed the instant application for a writ of habeas corpus. In such application, Sillick argues he was denied effective assistance of counsel

⁷ Iowa civil and criminal court records are available online at the following website: <http://www.iowacourts.state.ia.us>. The only record of procedendo being issued in this case is available online.

at trial and on direct appeal because (1) defense counsel failed to object to fundamentally flawed jury instructions that denied him due process of law and (2) the representation, in light of the record as a whole, was ineffective and unreasonable. Specifically, Sillick contends that after notifying the State that Sillick was going to raise intoxication and diminished responsibility as defenses to first-degree murder, and knowing the legal definition of each defense was separate and distinct, trial counsel failed to object to instructions that failed to define diminished responsibility and to distinguish it from intoxication. Furthermore, Sillick urges, defense counsel failed to preserve error regarding: (1) the fundamentally flawed jury instructions at each tier of the Iowa courts; and (2) the marshaling instruction submitted to the jury which commingled and misdefined essential elements of first-degree murder. Sillick argues the marshaling instruction failed to list all the jury findings and elements that the State had to prove before the jury was authorized to enter a verdict of guilty to first-degree murder as required by Iowa law. Sillick contends the State had the burden to disprove diminished responsibility and to prove the requisite specific intent for first-degree murder. Sillick maintains the jury was not informed in the marshaling instruction that before it could enter a verdict of guilty for first-degree murder, the lack of the State's proof of legal capacity absolutely precluded Sillick from harboring the specific intent for first-degree murder: the willful, deliberate and premeditated intent to take Wilson's life. Sillick contends the effect of the lack of legal capacity to a jury finding of specific intent was the very language omitted from the jury instructions in this case and which is expressly included in the Iowa Criminal Jury Instructions or the stock instructions. Sillick also contends defense counsel was ineffective for failing to raise due process and equal protection claims that the essential elements as defined and submitted to the jury in his case were at variance with the definitions of these essential elements in Iowa case law. Sillick's final ineffectiveness claim is that, examining

the record as a whole, he was denied effective assistance of counsel because his trial counsel failed to obtain a separate verdict form on diminished responsibility; the prosecutor, without objection, illegally disparaged the “defense” of diminished responsibility in the abstract; and trial counsel failed to present impeachment evidence of a State expert. Sillick contends he is entitled to relief because the decision of the Iowa Court of Appeals was an unreasonable application of the law and violated United States Supreme Court precedent.

On March 17, 2003, the court conducted an initial review of Sillick’s application for a writ of habeas corpus and ordered Respondent to file an answer. On April 17, 2003, Respondent filed such answer. On August 27, 2003, the court entered an order establishing a briefing schedule.

On October 2, 2003, Sillick submitted a brief in support of his application for a writ of habeas corpus. In such brief, Sillick contends he was denied effective assistance of trial and appellate counsel for the following reasons: (1) defense counsel failed to challenge jury instructions which contained due process violations; (2) defense counsel failed to challenge the definitional components of the intent for first-degree murder which misdefined the requisite statutory intent and removed or lessened the State’s burden of proof and denied him due process and equal protection; and (3) in light of the record as a whole, the representation at trial and on direct appeal was ineffective and unreasonable.

Specifically regarding the challenge to the jury instructions allegedly containing due process violations, Sillick argues the appellate review of his post-conviction relief proceeding was unreasonable because the Iowa Court of Appeals failed to determine whether Sillick’s jury instructions conformed with United States Supreme Court case law and further failed to review his case based on the jury instructions actually submitted in his case. Sillick urges the post-conviction relief appellate court fashioned an analysis to

uphold his conviction by treating the separate and single jury finding in the marshaling instruction, Instruction Number 15, as a finding by the jury that it considered and made a determination as to Sillick's ability to form intent and his possession of it. Sillick avers that from the standpoint of the jury instructions and jury findings presented in his case, the jury could not have considered and determined Sillick's ability to form intent and his possession of the requisite intent without violating due process. Sillick maintains the Iowa Court of Appeals in its post-conviction relief review of the ineffectiveness of counsel did not apply an appropriate and reasonable standard of review; that is, whether there was a reasonable likelihood that the jury had applied the challenged instruction in a way that violates the United States Constitution. Without trial counsel's securing of proper jury instructions regarding the determination of whether he had the mental capacity to form specific intent, Sillick contends, there existed a reasonable probability, but for counsel's unprofessional error, that the result of the proceedings would have been different. Sillick argues the jury was never informed that its finding related to a premeditated, deliberate and willful intent to kill inherently included a finding that the State had proved beyond a reasonable doubt that Sillick did not lack the mental capacity at the time of the shooting because of diminished responsibility or intoxication. Without informing the jury in Instruction Number 15 that the State must prove mental capacity, Sillick contends, the sole jury finding that Sillick harbored specific intent constituted a conclusive presumption that Sillick was also able to form the specific intent without a jury determination on the issue. In the Iowa Court of Appeals' review of the post-conviction relief proceedings, Sillick maintains, the court unreasonably applied principles of law without delineating whether the jury was informed about them and made determinations in conformity with the principles of law. Sillick argues the Iowa Court of Appeals' post-conviction relief decision is contrary to the United States Supreme Court's decision in *Strickland v. Washington*, 466

U.S. 668 (1984), in which the Supreme Court placed the obligation on trial counsel, rather than a state trial court, to make an independent examination of the pleadings and laws involved with a particular defense. Sillick avers trial counsel relied upon the trial judge to find an instruction that correctly informed and instructed the jury on mental capacity, integrated the defenses with a jury finding on specific intent, and interposed a determination of the defenses before the jury was authorized to enter a guilty verdict of first-degree murder.

Regarding the challenge to the elements of first-degree murder and the allegation of ineffectiveness due to counsel's lack of challenge to the failure to include each and every element the State must have proven or disproven in the instruction regarding first-degree murder, Sillick argues the definitions of the essential elements of first-degree murder in Iowa Criminal Jury Instructions 700.5 and 700.6, upon which the jury instructions in his trial were based, are fundamentally flawed because they materially differ from the definitions of those elements in *Hofer*, 28 N.W.2d at 475. Sillick contends the due process clause protects him from being convicted unless the State proves beyond a reasonable doubt every fact necessary to constitute the crime with which he was charged. Because the jury was without proper instructions on the essential elements of first-degree murder, Sillick urges his due process rights were violated. Sillick also contends the flawed jury instructions violated his right to equal protection under the law.

Regarding the challenge to the effectiveness of counsel during trial as a whole, Sillick contends his trial and appellate counsel were ineffective in the totality of the circumstances and within the context of the failure of counsel to: (1) challenge a trial information devoid of essential elements; (2) object to the omission of a diminished responsibility verdict form; (3) challenge the prosecutor's closing argument; and (4) exercise Sillick's right to compulsory process in regard to impeachment of Dr.

Frederickson's trial testimony.

On November 18, 2003, Respondent filed a resistance, asking the court to deny habeas relief.

On December 2, 2003, Sillick filed a reply brief in which he additionally argues the Iowa Court of Appeals, in deciding the ineffectiveness claim during the post-conviction relief proceedings, did not address the underlying *Hofer* instructional claim as a violation of federal due process and equal protection; neither did the Iowa Court of Appeals apply the harmless error standard to the underlying due process claim. Sillick contends this failure was both contrary to prior United States Supreme Court precedent and was an unreasonable review process. Sillick maintains he relies on state law for his due process claims and on the *Hofer* definitions of specific intent for first-degree murder. Sillick avers the Iowa Court of Appeals' decision failed to recognize that Iowa law permits a defendant to present as many defenses as are available. Sillick further urges that the Iowa Court of Appeals ignored the facts of his case - that legal capacity was the critical issue of controversy - when it concluded that because the marshaling instruction included one of the prongs of the intent determination, i.e., whether Sillick harbored the specific intent, that this was equivalent to a jury finding on both legal capacity for intent and the harboring of intent. A reviewing court, Sillick argues, has no way of knowing whether Instruction Number 20 was considered by the jury in its determination of first-degree murder. Therefore, Sillick continues, the decision of the Iowa Court of Appeals was contrary to United States Supreme Court and Iowa Supreme Court precedent and, thus, it was an unreasonable decision. Sillick further avers the United States Supreme Court decisions hold it is a due process violation where jury instructions in a criminal case set out either a conclusive or mandatory rebuttable presumption that relieves the prosecution of the burden of persuasion on the presumed fact. Here, Sillick argues, Instruction Number 15

only contained a jury finding on specific intent. Sillick contends the Iowa Court of Appeals used this single finding to conclusively presume that the jury considered and determined Sillick had the capacity to formulate the requisite intent. Sillick contends the Iowa Court of Appeals provided a *de novo* review of the substantive ineffectiveness claims but refused to treat counsel's failure to challenge the fundamentally flawed instructions, that is, the due process violations, under the harmless error standard. Sillick argues the actual marshaling instruction given at his trial omits a jury finding of mental capacity; such omission cannot be considered harmless. Sillick further avers the jury findings listed for conviction of first-degree murder in his case conclusively presume the jury considered and rejected the lack of mental capacity even though the jury findings in the actual marshaling instruction never informed the jury that this would be so.

On December 4, 2003, Respondent filed a response to Sillick's reply brief.

On June 18, 2004, Chief Magistrate Judge Jarvey issued a Report and Recommendation in this case, recommending the court deny Sillick's application for a writ of habeas corpus. Specifically, Chief Magistrate Judge Jarvey determined the state courts' post-conviction relief rulings regarding Sillick's ineffective assistance of counsel claims were not unreasonable applications of the *Strickland* standard.

On June 28, 2004, Sillick filed objections to such Report and Recommendation, claiming Chief Magistrate Judge Jarvey erred in the following ways: (1) Chief Magistrate Judge Jarvey gave preclusive effect to the state courts' decisions in the post-conviction relief proceedings; (2) he failed to apply the proper standard of review; (3) he ignored the "sufficient reasons" Sillick asserted for overcoming a procedural default and for not raising and litigating the supplemental ineffectiveness claims added to the ineffectiveness claim preserved by the Iowa Supreme Court on direct appeal; (4) he did not consider or note Sillick twice amended his post-conviction relief application, adding grounds to the original

ineffectiveness claims based on the final jury instructions; (5) he improperly analyzed the ineffectiveness of counsel in failing to object to the final instructions on the basis of the definitions of elements, a conclusive presumption, and combined and merged defense instructions; (6) he failed to apply his legal analysis to the content of the actual jury instructions submitted in Sillick's trial; (7) he incorrectly found Sillick seeks to challenge the jury instructions themselves apart from any ineffectiveness claim; (8) with regard to Instruction Number 20, he made no independent finding on whether the reason for trial counsel's tactical choice relates to each deficiency allegedly contained therein but instead relies on the conclusions of the prior courts that counsel's decision was within the normal range of competency and there was no evidence to support a finding the combined instruction was confusing; (9) he incorrectly determined any concepts not included in Instruction Number 20 were adequately explained in other instructions, because Instruction Number 20 was the only instruction on diminished responsibility and intoxication; (10) without discussion of the contents of Instruction Number 20, he found trial counsel reasonably relied upon the trial court's representation the combined instruction (found in Instruction Number 20) had been used in a similar case; (11) he is incorrect that Sillick must demonstrate the outcome of the trial would have been different but for counsel's ineffectiveness; (12) his legal analysis fails to make findings on the actual instructions submitted in Sillick's trial, especially in light of the marshaling instruction (number 15), specific intent instruction (number 19) and theories of defenses instruction (number 20); (13) he erroneously concluded that because Instruction Number 20 contains language that requires the jury to find legal capacity and the possession of intent, the instructions as a whole do not violate due process; (14) he improperly concluded no due process violation occurred where Instruction Number 15 solely contained a finding that Sillick possessed the specific intent for murder without explicitly requiring a finding on mental capacity or any

reference to any other instruction which interposes such a requirement before a first-degree murder verdict is authorized; (15) he relied upon two cases irrelevant to the standard of how a reasonable juror may have interpreted the instructions given in Sillick's trial; (16) he ignored two fundamental due process considerations – the jury is explicitly told in Instruction Number 15 what findings are necessary for a verdict of first-degree murder and mental capacity is not included in such instruction; (17) he failed to consider all grounds urged against Instruction Number 20 and to review the impact of this instruction from the standard of a reasonable juror; (18) without a comparative analysis of *Hofer* and the Iowa Criminal Jury Instructions, Chief Magistrate Judge Jarvey made the conclusory statement that equal protection and due process were not violated; (19) Chief Magistrate Judge Jarvey's report fails to provide the analysis needed to determine whether the state's application of the law is unreasonable; (20) he failed to compare the *Hofer* definitions of the elements of specific intent with the definitions in the Iowa Criminal Jury Instructions in order to assess the prejudice to Sillick and determine whether the state court application was unreasonable.

On June 29, 2004, Respondent filed a response to Sillick's objections.

Finding the 28 U.S.C. § 2254 application to be fully submitted and ready for decision, the court now turns to address the merits of such application.

III. STANDARD OF REVIEW

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b)(1)(C). *See also* Fed. R. Civ. P. 72(b) (provides for review of a magistrate judge’s recommendation on dispositive motions and prisoner petitions). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge’s report where such review is required. *See, e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (same). However, the plain language of the statute governing review provides only for *de novo* review of “those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C). Therefore, portions of the proposed findings or recommendations to which no objections were filed are reviewed only for “plain error.” *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for “plain error” where no objections to the magistrate judge’s report were filed).

IV. 28 U.S.C. § 2254 MOTION

It appears Sillick objects to all of Chief Magistrate Judge Jarvey’s conclusions. The court now turns to consider the issues *de novo*.

A. Applicable Standard

“[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The power of the federal courts to review state convictions under 28 U.S.C. § 2254 is limited. *Jolly v. Gammon*, 28 F.3d 51, 54 (8th Cir. 1994) (citing *Carter v. Armontrout*, 929 F.2d 1294, 1296 (8th Cir. 1991)). Habeas corpus relief is available only where errors of constitutional magnitude have occurred. *Id.* (citing *Carter*,

929 F.2d at 1296).

A habeas petitioner must show more than error requiring reversal on direct appeal to obtain relief. He must show the alleged error rendered the entire trial fundamentally unfair - that there is a reasonable probability that the error complained of affected the outcome of the trial - i.e., that absent the alleged impropriety, the verdict probably would have been different.

Harris v. Bowersox, 184 F.3d 744, 752 (8th Cir. 1999) (quoting *Carter*, 929 F.2d at 1296).

B. Analysis of Properly Exhausted Claims

In this case, Sillick raises two ineffective assistance of counsel claims which were adjudicated on the merits in state court proceedings: (1) counsel was ineffective for failing to object to fundamentally flawed jury instructions which violated Sillick's right to due process because they improperly combined and misdefined his theories of defense and omitted any reference to the fact the State had to disprove the defenses; and (2) counsel was ineffective for failing to object to an instruction regarding the definitions of specific intent elements, which violated Sillick's right to due process and equal protection because the instruction did not use language to define the elements identical to the language approved by the Iowa Supreme Court in *Hofer*. Pursuant to 28 U.S.C. § 2254,

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

the State court proceeding.

28 U.S.C. § 2254(d). Thus, “[28 U.S.C. §] 2254(d) distinguishes between two types of erroneous decisions—those of law and those of fact—and treats each in separate subparagraphs.” *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001). Claims of legal error are governed by the former while claims of factual error fall within the latter. *Id.* at 1029-30. Sillick seeks relief under the former – 28 U.S.C. § 2254(d)(1).

Under 28 U.S.C. § 2254(d)(1), a state prisoner may obtain federal habeas corpus relief with respect to a claim adjudicated on the merits in state court only through a showing that the state court’s decision was either contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362 (2000), explains the meaning of those statutory concepts and the degree of deference that must be afforded to state court determinations on the merits in federal habeas corpus proceedings concerning state prisoners under the Antiterrorism and Effective Death Penalty Act (“AEDPA”). *See Newman v. Hopkins*, 247 F.3d 848, 850-52 (8th Cir. 2001) (discussing effect of *Williams*).

Under *Williams*, a state-court decision can be “contrary to” United States Supreme Court precedent in two ways: (1) if the state court “arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law” or (2) if the state court “confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent].” *Williams*, 529 U.S. at 405. Further, “the [statutory] phrase ‘clearly established Federal law, as determined by the Supreme Court of the United States,’ . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Id.* at 412.

An “unreasonable application” of United States Supreme Court precedent can also

arise in two ways. The Supreme Court explained:

First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id.* Notably, however,

[u]nder [28 U.S.C.] § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas [corpus] court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411.

Applying these standards to the present case, the court's inquiry must be whether the Iowa courts reached a decision contrary to that reached by the United States Supreme Court on a question of law, or alternatively, whether the Iowa courts correctly identified the applicable principles of federal law but then unreasonably applied that law to the facts of Sillick's claim. *See, e.g., Newman*, 247 F.3d at 850-52 (discussing *Williams*); *Weaver*, 241 F.3d at 1029-30 (same); *Closs v. Weber*, 238 F.3d 1018, 1020 (8th Cir. 2001) (same); *Copeland v. Washington*, 232 F.3d 969, 973 (8th Cir. 2000) (same). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law

questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Determinations of state law made by the state courts are binding. *See Crump v. Caspari*, 116 F.3d 326, 327 (8th Cir. 1997).

1. Ineffective Assistance of Counsel Standard

Sillick asks the court for habeas corpus relief because he allegedly received ineffective assistance of counsel at the trial and appellate levels. Specifically, Sillick contends his trial and appellate counsel’s deficient performance was of constitutional proportion because counsel failed to object that the essential elements of first-degree murder in the jury instructions were fundamentally flawed, violating Sillick’s rights to due process and equal protections of the laws. The Sixth Amendment to the United States Constitution provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const., Amend. VI. Furthermore, criminal defendants have a constitutional right to effective assistance of counsel in their first appeal. *Evitts v. Lucey*, 469 U.S. 387, 393-95 (1985); *Douglas v. Cal.*, 372 U.S. 353, 356-57 (1963). The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Wash.*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court explained that a violation of that right has two components:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687; *see also Armstrong v. Kemna*, 365 F.3d 622, 627 (8th Cir. 2004) (reasserting

Strickland standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, “a court deciding an ineffective assistance claim need not address both components of the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed.” *Id.*; see also *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) (“[A court] need not address the reasonableness of the attorney’s behavior if the movant cannot prove prejudice.”).

To establish unreasonably deficient performance, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The “reasonableness of counsel’s challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. There is a strong presumption of competence and reasonable professional judgment. *Id.*; see also *United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”) (quoting *Strickland*, 466 U.S. at 689); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694). In sum, the court must “determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance.” *Strickland*, 466 U.S. at 690.

To establish prejudice, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. In other words, “the question is whether there is a reasonable probability that, absent those errors, the fact finder would have had a reasonable doubt respecting guilt.” *Id.* at 695. In answering that question, the court “must consider the totality of the evidence before the judge or jury.” *Id.*

2. Combined Defense Instruction and Marshaling Instruction Errors

Sillick raises two claims which he combines into one overall argument. First, Sillick argues his trial and appellate counsel were ineffective for failing to object to the theory of defense instruction which combined the concepts of “diminished responsibility” and “intoxication.” Second, Sillick argues his trial counsel was ineffective for failing to object to the omission of any reference to the defenses in the marshaling instruction. Because appellate counsel raised the latter issue on direct appeal, Sillick limits that argument to only trial counsel. In support of his ineffective assistance claims, Sillick contends the jury instructions given, Instruction Number 20 regarding the theories of defense and Instruction Number 15 listing the essential elements the State must prove in order to convict Sillick of first-degree murder, violated his right to due process pursuant to *In re Winship*, 397 U.S. 358 (1970), *Francis v. Franklin*, 471 U.S. 307 (1985), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Connecticut v. Johnson*, 460 U.S. 73 (1983). In support of his contention, Sillick avers the Iowa courts’ decisions, in conducting post-conviction relief proceedings, were contrary to, or involved an unreasonable application of *Strickland* because, Sillick maintains, *Strickland* places an obligation on trial counsel, rather than the trial court, to make an independent examination of the pleadings and laws involved in the potential defenses available.

a. Combined Defense Instruction

Jury Instruction 20, the instruction regarding Sillick’s theories of defense, reads:

“Diminished responsibility” means a mental condition which does not allow the person to form a specific intent. Concerning element number 4 of Instruction No. 15, it means a mental condition which does not allow the person to form a premeditated, deliberate, specific intent to kill.

“Diminished responsibility” does not entirely relieve a person of the responsibility for his actions and is not the same as an insanity defense.

The Defendant claims he was under the influence of drugs at the time of the alleged crime. The fact that a person is under the influence of drugs does not excuse nor aggravate his guilt.

Even if a person is under the influence of a drug, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the drug and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.

Neither “diminished responsibility” nor “intoxication” can reduce Second Degree Murder to Manslaughter.

The Defendant does not have to prove “diminished responsibility” or “intoxication”; rather, the burden is on the State to prove the Defendant was able to, and did, form the specific intent required.

State v. Sillick, No. 6-569/95-0578, Appellant’s Appx. at 617-18. Had the court read separately each defense instruction from the Iowa Criminal Jury Instructions, the instruction regarding diminished responsibility would have read:

“Diminished responsibility” means a mental condition which does not allow the person to form a premeditated, deliberate, specific intent to kill.

“Diminished responsibility” does not entirely relieve a person of the responsibility for his actions and is not the same as an insanity defense.

You should determine from the evidence if the

defendant was capable of premeditating, deliberating, and forming a specific intent to kill.

If you have a reasonable doubt the defendant was capable of acting deliberately, with premeditation, and the specific intent to kill, then the defendant cannot be guilty of First Degree Murder. You should then consider lesser included charges.

Iowa Crim. Jury Instr. 200.12; *Sillick v. State*, No. 01-284, Appellant's Appx. at 597.

The intoxication instruction would have read:

The defendant claims he was under the influence of drugs at the time of the alleged crime. The fact that a person is under the influence of drugs does not excuse nor aggravate his guilt.

Even if a person is under the influence of a drug, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the drug and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.

Iowa Crim. Jury Instr. 200.14; *Sillick v. State*, No. 01-284, Appellant's Appx. at 597-98.

The court notes the combined instruction given to the jury at Sillick's trial omits the language from the diminished responsibility instruction that informs the jury it must determine whether Sillick was capable of premeditating, deliberating, and forming a specific intent to kill, and if the jury has a reasonable doubt as to those elements, Sillick cannot be guilty of first-degree murder. *See* Iowa Crim. Jury Instr. 200.12; *Sillick v. State*, No. 01-284, Appellant's Appx. at 597. However, the court also notes the instruction given to the jury at Sillick's trial includes additional language informing the jury that Sillick does not have to prove his defenses, but instead, the State must prove Sillick "was able to, and did, form the specific intent required." *State v. Sillick*, No. 6-

569/95-0578, Appellant's Appx. at 617-18.

The Iowa District Court for Linn County, in considering Sillick's application for post-conviction relief, addressed Sillick's claim regarding the combined theories-of-defense instruction as follows: "According to Mr. Grinde, the decision to combine the jury instructions of diminished responsibility and intoxication was tactical. He, and co-counsel Quint Meyerdirk, felt that it would be less confusing to the jury to use a combined instruction suggested by the presiding judge. There is no evidence on the record that the jury instruction was confusing to the jury." *Sillick v. State*, No. LACV033083 at 4.

In affirming the Iowa District Court for Linn County's ruling denying Sillick post-conviction relief, the Iowa Court of Appeals briefly summarized Sillick's argument and laid out the combined theories-of-defense instruction actually given at Sillick's trial and the portion omitted from the model instructions. *Sillick v. State*, No. 01-0284 at 7-8. The Iowa Court of Appeals then determined, regarding the combined theories-of-defense instruction, the following:

Sillick introduced evidence at trial that he suffered from cocaine intoxication and cocaine-induced psychosis at the time he shot Wilson. We assume without deciding that he was entitled to instructions on both defenses. Sillick's trial counsel testified at the postconviction hearing that because of the specific nature of this case in which the intoxication aspect and the diminished responsibility aspect were so intermeshed it would be more confusing to the jury to have two separate instructions. He thought the single instruction was easier for the jury to understand. As shown by defense counsel's testimony, it was a strategic decision to have one instruction cover both diminished responsibility and intoxication. Further, we evaluate instructions as a whole, not piecemeal or in artificial isolation. *State v. Chambers*, 529 N.W.2d 617, 620 (Iowa Ct. App. 1994). Viewing the instructions as a whole, we believe the concepts embodied in the two paragraphs of

Iowa Criminal Jury Instruction 200.12 that were not included in the trial court's instruction are adequately explained in the trial court's Instructions 2, 4, 6, 7, and 15, Iowa Criminal Jury Instructions 100.2, 100.8, 100.10, 100.11, and 700.1 respectively. We find no breach of duty or prejudice in counsel not objecting to the two paragraphs not being included.

Id. at 8-9.

The court has reviewed the United States Supreme Court decisions which Sillick avers support his position the combined theories-of-defense instruction violated his right to due process. The court finds his reliance on such cases to be without merit. The court notes:

[a]lthough hindsight may make a decision appear unwise or unsound, when scrutinizing counsel's performance a court "must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct 2052.

Underdahl v. Carlson, 381 F.3d 740, 743 (8th Cir. 2004). In light of this deferential standard, the court cannot say the holding of the Iowa Court of Appeals was an unreasonable application of clearly established federal law. Because the court cannot say the Iowa Court of Appeals' decision was contrary to, or involved an unreasonable application of any clearly established legal principle (particularly the cases Sillick cites) as determined by the United States Supreme Court, the court rejects Sillick's objection to Chief Magistrate Judge Jarvey's conclusion regarding the Iowa Court of Appeals' determination Sillick's trial counsel was not ineffective for failing to object to the combination defense instruction and the omission of essential elements of the defenses from Instruction Number 20.

b. Marshaling Instruction Errors

Sillick contends he received ineffective assistance from trial counsel because of his attorneys' failure to object to the marshaling instruction (Instruction Number 15). Sillick maintains Instruction Number 15 was constitutionally defective because it did not inform the jury the State had to disprove his defenses, it did not in any way refer to the theory of defense instruction, and it did not indicate how the defenses were to be considered in relation to the essential elements of first-degree murder. Sillick avers the failure to mention his defenses and their involvement in the determination of whether the State had proved all of the essential elements of first-degree murder created a conclusive presumption that he could form the requisite specific intent where the jury was only asked if Sillick harbored such intent without a separate finding that he could form such intent.

Instruction Number 15 provides as follows:

The State must prove all of the following elements of Murder in the First Degree:

1. On or about the 2nd day of May, 1994, the Defendant shot Tammi Wilson.
2. Tammi Wilson died as a result of being shot.
3. The Defendant acted with malice aforethought.
4. The Defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Tammi Wilson.

If the State has proved all of the elements, the Defendant is guilty of Murder in the First Degree. If the State has failed to prove any one of the elements, the Defendant is not guilty of Murder in the First Degree, and you will then consider the charge of Murder in the Second Degree as explained in Instruction No. 25.

State v. Sillick, No. 6-569/95-0578, Appellant's Appx. at 616-17. When considering

Sillick's application for post-conviction relief, the Iowa District Court for Linn County did not specifically address Sillick's challenge to the omission of any reference to the theories of defense in the marshaling instruction. The court did, however, indicate it had examined all claims raised, including the instant claim, and found Sillick's "trial counsel as well as the appellate counsel acted well within the range of normal competency required of a defense attorney." *Sillick v. State*, LACV033083 at 4.

In affirming the Iowa District Court for Linn County's ruling denying Sillick post-conviction relief, the Iowa Court of Appeals determined:

Third, we address Sillick's contention that Instruction 15 was inadequate for failing to require the State to disprove his "defenses" as an added element, and find this contention meritless. The State is not required to disprove diminished responsibility or intoxication as an additional element in its proof. *State v. Reinhart*, 283 N.W.2d 319, 320 (Iowa 1979) (diminished responsibility); *State v. Templeton*, 258 N.W.2d 380, 383 (Iowa 1977) (intoxication). Furthermore, Instruction 20 (combined instruction) adequately informed the jury as to the defenses of diminished responsibility and intoxication. That instruction notified the jury that Sillick did not have the burden of proving the defenses, but instead the State had the burden of proving he was able to and did form the requisite specific intent. The instruction adequately defined the relationship between the defenses and specific intent.

Counsel had no duty to raise these meritless issues, and Sillick suffered no prejudice as a result of counsel not doing so.

Sillick v. State, No. 01-0284 at 10-11.

The court has reviewed the United States Supreme Court decisions which Sillick avers support his position that the marshaling instruction violated his right to due process. The cases upon which Sillick relies, *Francis*, 471 U.S. 307, and *Sandstrom*, 442 U.S. 510, hold that the Due Process Clause prohibits mandatory presumptions in jury instructions

which place the burden on a defendant to disprove an essential element of the crime charged. Mandatory presumptions “violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense.” *Francis*, 471 U.S. at 314 (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977) for the proposition that “a State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.”). The Iowa Court of Appeals rejected Sillick’s argument that the marshaling instruction created a mandatory presumption Sillick could form the requisite specific intent because the jury was only asked whether Sillick harbored such intent without a separate finding that he could form such intent.

The court finds the Iowa Court of Appeals’ decision was not an unreasonable application of federal law. The court specifically finds nothing unreasonable about the conclusion Sillick suffered no prejudice as a result of counsel’s failure to object to the omission of any reference to Sillick’s defenses in the marshaling instruction. Taken as a whole, the instructions adequately informed the jury of the State’s burden of proof and the fact Sillick did not have to prove his defenses or disprove he harbored the requisite specific intent to commit first-degree murder. The court finds no discernable prejudice in the failure to object to jury instructions which, taken as a whole, do not fail to provide Sillick with due process. Furthermore, the court finds the Iowa Court of Appeals’ decision was not contrary to the holdings of *Francis* or *Sandstrom*. Because the court cannot say the Iowa Court of Appeals’ decision was contrary to, or involved an unreasonable application of any clearly established legal principle (particularly the cases Sillick cites) as determined by the United States Supreme Court, the court rejects Sillick’s objection to Chief Magistrate Judge Jarvey’s conclusion regarding the Iowa Court of Appeals’ determination that Sillick’s trial counsel was not ineffective for failing to object to the omission of

reference to the defenses from Instruction Number 15. The court rejects Sillick's objection to Chief Magistrate Judge Jarvey's conclusion regarding the Iowa Court of Appeals' determination that Sillick's appellate counsel was not ineffective for failing to raise on direct appeal an objection to the omission of essential elements of the defenses from the marshaling instruction.

3. Definitions of Specific Intent Elements

Sillick contends his trial and appellate counsel were ineffective because they failed to object to an instruction which defined the elements of specific intent in language other than that found in *Hofer*. In order to raise this issue for the first time in post-conviction relief proceedings, Sillick argues his argument that the essential elements are flawed is novel. Specifically, Sillick maintains he has raised an issue the Iowa courts had not considered before his post-conviction relief proceedings. Sillick avers the definitions of the elements of specific intent found in the Iowa Criminal Jury Instructions are not the same as the definitions of those same terms in *Hofer*, 28 N.W.2d at 475, the Iowa Supreme Court decision which set forth the essential elements of first-degree murder in Iowa.⁸ Because the Iowa Criminal Jury Instructions do not track the definitions in *Hofer* precisely, Sillick urges, use of the particular Iowa Criminal Jury Instruction violated his right to due process pursuant to *Hicks v. Oklahoma*, 447 U.S. 343 (1979). Sillick also argues *In re Winship*, 397 U.S. 358 (1970) and *Pope v. Illinois*, 481 U.S. 497 (1987) stand for the constitutional guarantee that a state court cannot misdefine and commingle essential elements of a crime. Furthermore, Sillick asserts, because his jury instructions are not identical to those approved in *Hofer*, the jury instruction defining specific intent

⁸ The particular definitions Sillick challenges are those defining the terms "premeditation," "deliberateness," "willfulness," and "malice aforethought." See Petitioner's Br. at 51.

for first-degree murder given in Sillick’s trial deprived him of a fundamental liberty interest: the guarantee of being tried on the same definitions of specific intent which were used for the homicide trial in *Hofer*, and, thus, his right to equal protection under the law was violated pursuant to *Plyler v. Doe*, 457 U.S. 202 (1982). Sillick apparently offers evidence of the due process and equal protection violations merely to support his contention counsel was ineffective for failing to object to the instruction at trial rather than bringing separate due process and equal protection claims in his post-conviction relief application.⁹

In *Hofer*, the Iowa Supreme Court approved of an instruction setting forth the definitions of the elements of specific intent as follows:

“[W]illful” means the act was the result of the conscious will of the perpetrator, was of purpose, intentional and not accidental; “deliberate” means the act was the result of a purpose formed after weighing the considerations for and against the doing of the act; “premeditated” means the act was thought of beforehand and done in pursuance of a prior intention or plan.

Hofer, 28 N.W.2d at 483. The instruction continued,

[F]or a killing done with malice aforethought to be willful, deliberate and premeditated does not mean the killing must have been conceived or intended for any particular length of

⁹ The court need not address *de novo* the underlying due process and equal protection issues of the allegedly flawed jury instruction because Sillick explicitly limited his objections to ineffective assistance of counsel claims. *See* Petitioner’s Objections to Report and Recommendation at 7 (“The Magistrate’s finding that Sillick seeks to challenge the jury instructions themselves is incorrect. Mr. Sillick discussed the constitutional deficiencies in certain instructions to demonstrate counsel was ineffective.”). The court finds Chief Magistrate Judge Jarvey’s findings regarding the due process and equal protection issues of the allegedly flawed jury instruction did not rise to the level of plain error. *See Griffini*, 31 F.3d at 692.

time before the act is done; the will or purpose to do it, the deliberation and premeditation, and the killing may follow each other as rapidly as successive impulses of thought of the human mind.

Id. at 482-83. The Iowa Supreme Court also approved of an instruction informing the jury regarding the definition of “malice aforethought”:

[M]alice aforethought is a fixed purpose or design to do some physical harm to another existing prior to the act complained of; it need not be shown to have existed for any length of time before, but only requires such deliberation as makes a person appreciate and understand at the time the act is committed its nature and probable consequences as distinguished from an act done in the heat of passion; it is sufficient if such purpose was formed before and continued to exist at the time of the injury; malice includes not only hatred and ill will but also any other unlawful or unjustifiable motive which inspires one to injure another and it may be inferred from the willful doing of an unlawful act, without just provocation or excuse, with intent to injure the person of another; it may mean simply a vicious and wanton disregard of another’s rights; malice may be express or implied; express malice indicates a wicked mind; malice may be implied from the unlawful use of a deadly weapon in a manner calculated to take the life of another.

Id. at 482. The 1993 version of the Iowa Criminal Jury Instructions, which were used in Sillick’s trial, provide definitions of the elements of specific intent as: “‘Willful’ means intentional or by fixed design or purpose and not accidental. ‘To deliberate’ is to weigh in one’s mind, to consider, to contemplate, or to reflect. ‘Premeditate’ is to think or ponder upon a matter before acting.” Iowa Crim. Jury Instr. 700.5; *Sillick v. State*, No. 01-284, Appellant’s Appx. at 594. Iowa Criminal Jury instruction 700.6 provides, “Deliberation and premeditation need not exist for any particular length of time before the act.” Iowa Crim. Jury Instr. 700.6; *Sillick v. State*, No. 01-284, Appellant’s Appx. at

594. The Iowa Criminal Jury Instructions define “malice aforethought” as follows: “‘Malice aforethought’ is a fixed purpose of design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time. It is sufficient if it exists any time before the killing.” Iowa Crim. Jury Instr. 700.7; *Sillick v. State*, No. 01-284, Appellant’s Appx. at 594.

The Iowa District Court for Linn County, in considering Sillick’s application for post-conviction relief, did not specifically address Sillick’s claim regarding the definitions of the elements of specific intent for first-degree murder. The court did, however, indicate it had examined all claims raised, including the instant claim, and found Sillick’s “trial counsel as well as the appellate counsel acted well within the range of normal competency required of a defense attorney.” *Sillick v. State*, LACV033083 at 4.

In affirming the Iowa District Court for Linn County’s ruling denying Sillick post-conviction relief, the Iowa Court of Appeals determined, regarding the instruction containing the definitions of specific intent for first-degree murder, the following:

First, we address the issue involving the definitions. After reviewing the definitions, we find that although they do not quote *Hofer ver[bat]im*, they are consistent with *Hofer*’s definitions. Although the definition of “malice aforethought” is not complete in that the instruction informs the jury that it must exist before the act is committed but does not inform the jury it must also exist at the time of the act, the omission is not prejudicial because the marshalling instruction makes it clear it must also exist at the time of the act. *State v. Lee*, 494 N.W.2d 706, 606 (Iowa 1993). Counsel had no duty to raise this meritless issue. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Second, we address Sillick’s equal protection and due process claims. Due process requires that jury instructions adequately instruct the jury on the elements of first-degree murder and the State’s responsibility to prove them. *See State*

v. McMullin, 421 N.W.2d 517, 519-20 (Iowa 1988). The inquiry is whether an allegedly ailing instruction so infected the entire trial that the result violates due process. *Id.* at 520. The Equal Protection Clause requires that all members of the same class be treated equally under like conditions. *State v. Haines*, 360 N.W.2d 791, 795 (Iowa 1985). Equal protection is not denied because in practice some inequality exists. *Id.* We find no due process or equal protection violations. The definitions at issue were adequate and materially followed the decisions in *Hofer* and *Lee*. Sillick has not indicated that he was a member of a protected class or that he was treated differently than similarly-situated defendants.

Sillick v. State, No. 01-0284 at 9-10.

In order for Sillick to prove deficient performance, he must demonstrate his counsel's performance was objectively unreasonable. *See Armstrong*, 365 F.3d at 627 (citing *Strickland*, 466 U.S. at 688). The court finds the failure to raise what Sillick admits is a novel issue of due process and equal protection violations resulting from fundamentally flawed model jury instructions was not objectively unreasonable. *See Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) (ruling trial and appellate counsel's failure to raise a novel issue does not constitute deficient performance); *Wajda v. United States*, 64 F.3d 385, 388 (8th Cir. 1995) ("[C]ounsel's performance is not deficient by failing to predict future developments in the law."). Counsel could not have predicted such novel argument would be raised during post-conviction relief proceedings.¹⁰

Because the court cannot say the Iowa Court of Appeals' decision was contrary to, or involved an unreasonable application of any clearly established legal principle (particularly the cases Sillick cites) as determined by the United States Supreme Court, the

¹⁰ Because the court can discard this claim on the deficient performance issue, the court need not address the issue of prejudice. *See Strickland*, 466 U.S. at 697.

court rejects Sillick’s objection to Chief Magistrate Judge Jarvey’s conclusion regarding the Iowa Court of Appeals’ determination that Sillick’s trial counsel was not ineffective for failing to object on the ground that the essential elements of first-degree murder in the jury instructions were fundamentally flawed. The court, therefore, also rejects Sillick’s objection to Chief Magistrate Judge Jarvey’s conclusion regarding the Iowa Court of Appeals’ determination Sillick’s appellate counsel was not ineffective for failing to raise the issue on direct appeal.

C. Procedurally Defaulted Claim

Sillick raises a claim which was not adjudicated on the merits in state court proceedings – his allegation trial and appellate counsel were ineffective in the totality of the circumstances and within the context of the failure of counsel to challenge a trial information devoid of essential elements, to object to the omission of a diminished responsibility verdict form, to challenge the prosecutor’s closing argument, and to exercise Sillick’s right to compulsory process in regard to impeachment of Dr. Frederickson’s trial testimony. The government argues such claim is procedurally defaulted because it was not raised in the state post-conviction relief proceedings.

Before a petitioner may obtain federal habeas corpus review of his state confinement, he must first “exhaust” his federal claims in the appropriate state forum. 28 U.S.C. § 2254(b)(1).¹¹ “In other words, the state prisoner must give the state courts an

¹¹ 28 U.S.C. § 2254(b)(1) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State, or

(continued...)

opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see also* 28 U.S.C. § 2254(c).¹² In Iowa, exhaustion requires a petitioner to seek discretionary review from the Iowa Supreme Court after the Iowa Court of Appeals rejects an appeal argument. *See O’Sullivan*, 526 U.S. at 845-48. The fair presentment component of the exhaustion requirement compels a petitioner to affirmatively:

refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue.

Ashker v. Leapley, 5 F.3d 1178, 1179 (8th Cir. 1993) (quotations and citations omitted). A claim is not fairly presented to the state courts unless the same factual grounds and legal theories asserted in the prisoner’s federal habeas corpus petition have been properly raised in the prisoner’s state court proceedings. *Keithley v. Hopkins*, 43 F.3d 1216, 1217 (8th Cir. 1995); *Flieger v. Delo*, 16 F.3d 878, 884 (8th Cir. 1994). *See also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam) (“If state courts are to be given the opportunity to correct alleged violations of prisoner’s federal rights, they must surely be alerted to the fact the prisoners are asserting claims under the United States Constitution. . . . mere similarity of claims is insufficient to exhaust remedies.”); *Keeney v. Tamayo-Reyes*, 504

(...continued)

- (B) (I) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

¹² 28 U.S.C. § 2254(c) provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

U.S. 1, 8 (1992) (full and fair presentment of claims to the state court requires “full factual development” of the claims in that forum); *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (“Presenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirement.”).

In *O’Sullivan*, the United States Supreme Court noted state courts are required to enforce federal law, so if a state prisoner claims his confinement for a conviction violates federal law, the prisoner should first raise the federal claims to the state courts for relief. *O’Sullivan*, 526 U.S. at 844. The Supreme Court further opined,

[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process [on post-conviction relief].

Id. at 845; *see also Laws v. Armontrout*, 834 F.2d 1401, 1412 (8th Cir. 1987) (“The purpose of the fair presentation component of the exhaustion requirement is to give state courts the first opportunity to review federal constitutional issues and to correct federal errors made by the state’s trial courts.”). If a petitioner has not fully presented his federal claims in state court, the claims are barred in federal court and must be dismissed, unless the petitioner can either show both good cause for his failure to present the claims in state court and actual prejudice as a result of the alleged constitutional violation or demonstrate that failure to review the claim would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Keithley*, 43 F.3d at 1218.

Sillick did raise the issue of ineffective assistance based on counsel’s cumulative error in the totality of the circumstances before the Iowa District Court for Linn County

and the Iowa Court of Appeals. However, Sillick failed to raise the claim when seeking further review from the Iowa Supreme Court. The court finds Sillick's failure to raise the claim based on cumulative error in every tier of the state post-conviction relief proceedings has resulted in a procedural default of such claim. *See O'Sullivan*, 526 U.S. at 848 (determining the petitioner's failure to present three of his federal habeas claims to the Illinois Supreme Court resulted in those claims being procedurally defaulted). Additionally, Sillick fails to show good cause for any failure to present his cumulative error claim to the Iowa Supreme Court and actual prejudice as a result of the alleged constitutional violation or a potential for the fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750; *Keithley*, 43 F.3d at 1218. Therefore, the court denies Sillick's application for a writ of habeas corpus based on the allegation that, in the totality of the circumstances, he received ineffective assistance of trial and appellate counsel.

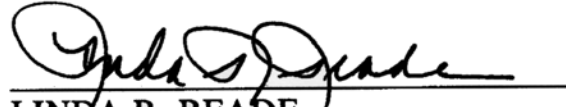
V. CONCLUSION

In sum, the court finds Sillick is not entitled to relief pursuant to 28 U.S.C. § 2254. Accordingly, **IT IS HEREBY ORDERED:**

- (1) Sillick's Objections to Chief Magistrate Judge Jarvey's Report and Recommendation (docket no. 19) are **OVERRULED**.
- (2) The court **ADOPTS** as modified herein Chief Magistrate Judge Jarvey's Report and Recommendation (docket no. 18).
- (3) The Clerk of Court is directed to enter judgment dismissing Sillick's 28 U.S.C. § 2254 petition.

SO ORDERED.

DATED this 25th day of February, 2005.



LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA